**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **CHAD SMITH** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 183,560 |
| **IBP, INC.** | ) | |
| Respondent | ) | |
| Self-Insured | ) | |
| AND | ) | |
| | ) | |
| **KANSAS WORKERS COMPENSATION FUND** | ) | |

## ORDER

Respondent appeals from an Award entered by Special Administrative Law Judge William F. Morrissey on March 17, 1997. The Appeals Board heard oral argument September 3, 1997. Board Member Gary M. Korte has recused himself from participation in this case and Stacy A. Parkinson of Olathe, Kansas, has acted in his place as Board Member Pro Tem.

## APPEARANCES

Claimant appeared by his attorney, Diane F. Barger of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Craig A. Posson of Dakota City, Nebraska. The Kansas Workers Compensation Fund appeared by its attorney, Derek R. Chappell of Ottawa, Kansas.

## RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

## ISSUES

The issues on appeal are as follows:

(1) Average weekly wage. The Special ALJ calculated the average weekly wage by using a six-day week, applying principles from Tovar v IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). Respondent argues a five-day work week should be used instead.

(2) Nature and extent of disability. The Special ALJ found claimant suffers a 7 percent impairment of the right arm which converts to 4 percent of the whole body and a 36 percent impairment of the left arm which converts to 22 percent of the whole body. He combined the two upper extremity ratings to arrive at an award for 25 percent of the whole body. Respondent argues the disability found by the Special ALJ is too high because the Special ALJ considered ratings given by one physician before claimant reached maximum medical improvement and by another after claimant had aggravated his injuries working for another employer.

Claimant, on the other hand, argues the disability is higher than the Special ALJ found. Claimant contends the lowest rating, that given by the treating physician, should be disregarded because the physician failed to consider neurological damage and his rating is out of line compared to the two other ratings.

(3) Future medical treatment. Respondent argues claimant is not entitled to future medical treatment at respondent's expense because claimant aggravated his injuries working for other employers and any further medical treatment relates to the aggravation.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds claimant is entitled to benefits based on 25 percent permanent partial disability to the body as a whole and an average weekly wage of $379.46. The Board also finds claimant is entitled to future medical treatment on proper application to and approval by the Director.

### Findings of Fact

(1) Claimant worked for respondent from November 30, 1992, to August 19, 1993. He first worked trimming legs and was soon moved to a job popping the kidneys out of carcasses with a hook. Most of the work was about chest high but some above shoulder level.

(2) In late January or early February of 1993 claimant began having soreness in his shoulders, arms, and hands. Although claimant testified he reported the problems earlier, dispensary records show complaints beginning in May 1993. Claimant was put on light duty and in September 1993 he quit.

(3) Claimant was expected to be available to work Saturdays. Of the 26 weeks preceding June 25, 1993, the date the parties agreed to treat as the date of accident, claimant worked on Saturday four times.

(4) Claimant earned $7.05 per hour. During the 26 weeks before his June 25, 1993, date of accident, claimant worked more than 8 hours of overtime on two occasions, one week he worked 10 hours overtime and the other 10.25 hours.

(5) After claimant quit working for respondent, respondent sent him first to Dr. Lowry Jones. Dr. Jones ordered an EMG and the results of the November 30, 1993, test were normal.

(6) When claimant continued to have problems, respondent sent him to John B. Moore, IV, M.D. Dr. Moore first saw claimant May 13, 1994, and, after repeat EMG testing, diagnosed bilateral cubital tunnel syndrome with bilateral compression of the ulnar nerve of the wrist. Dr. Moore performed a left ulnar nerve release on August 11, 1994, at both the wrist and the elbow. He did the same surgery on the right on September 1, 1994. Because of continuing problems, he redid the surgery on the left wrist on February 9, 1995.

(7) Claimant worked for several employers after working for respondent and earned a wage comparable to the wage he earned working for respondent.

(8) He first worked for seven to nine months as farm manager for McCarthy Farms. He had four people working under him. His daily duties included outlining the work to be done by others and checking on the cattle and fence. He occasionally drove a tractor, two or three days per week for an hour or two at a time. Claimant testified the work did not worsen the problems he was having with his upper extremities. Claimant left McCarthy Farms at the end of May or beginning of June 1994 when the owners sold the business because of their own health problems.

(9) After McCarthy Farms, claimant worked one month as a general laborer where he described his duties as pushing a broom and picking up a board here and there. Claimant then went to Topeka Technical College until May 1995.

(10) After technical school claimant worked briefly at Hamm Construction, first as an apprentice electrician and then as a truck driver.

(11) At the time of the regular hearing in this case, April 18, 1996, claimant was working for PTMW, a company which puts together the housing for railroad crossing signals. Claimant's duties included cutting plastic pipe on a band saw or plastic pieces on a chop saw. He also pulled parts from shelves.

(12) Claimant testified that the work he did after leaving respondent did not worsen the problems he was having with his upper extremities.

(13) Dr. Moore released claimant to return to work without restrictions on August 8, 1995. Dr. Moore rated claimant's impairment as 1 percent of the right upper extremity and 14 percent of the left upper extremity. Dr. Moore combined these rating to arrive at 9 percent of the whole body. Dr. Moore believed that as little as 50 percent of this impairment was from work at IBP with the remainder due to activities since. This conclusion was based on the fact that claimant had what Dr. Moore understood to be a normal EMG at the time claimant saw Dr. Jones, at about the time claimant left work for respondent. Dr. Moore also understood claimant worked only three months for respondent when, in fact, he worked approximately ten

months. Dr. Moore acknowledged the ten months made it more likely the problems resulted from work for respondent.

(14) Dr. Sergio Delgado examined claimant at the request of claimant's counsel on June 9, 1995. Dr. Delgado rated claimant's impairment as 32 percent of the whole body based on impairment in both upper extremities. Dr. Delgado reviewed the EMG studies done in November 1993 and those done for Dr. Moore in May 1994. According to Dr. Delgado, it was not unusual to have a normal EMG at the early stages of ulnar nerve problems. When he read claimant's description of his duties in the farm job, Dr. Delgado opined that those duties were not likely to have been the cause of claimant's problems. Dr. Delgado considered the second EMG study to have been a more thorough study. Dr. Delgado also testified that the differences in the two EMG's could be caused by progression of the disease, differences in the equipment, and differences in the thoroughness of the examination. He did not give an opinion as to which caused the differences but did opine that the symptoms when claimant first saw Dr. Jones were symptoms of the neuropathy even though it did not register on the EMG.

(15) Lynn D. Ketchum, M.D., examined the claimant on December 12, 1995, at the request of the ALJ. Dr. Ketchum did not testify but his report was considered. Although claimant had mild symptoms on the right, Dr. Ketchum found no evidence of compressive neuropathy at the elbow or wrist and found normal strength on the right. On the left, he found severe compressive neuropathy at both the elbow and the wrist with marked weakness and atrophy. He rated the left upper extremity as a 54 percent impairment. He did not provide a rating for the right upper extremity.

(16) The Board finds claimant's work after leaving respondent did not significantly worsen or permanently aggravate his injuries.

## Conclusions of Law

(1) For an hourly employee, the average weekly wage is computed by first calculating a daily rate. The daily rate is the hourly rate times the number of hours constituting an ordinary day. The daily rate is then multiplied by the number of days the employee is regularly expected to work. K.S.A. 1992 Supp. 44-511. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), held that the average weekly wage should be based on a six-day work week for an employee who is expected to keep Saturdays open and be available to work six days per week.

(2) Claimant is entitled to a wage calculated on the basis of a six-day work week. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The base wage is, therefore, $338.40 (48 hours times $7.05 per hour). The evidence does not show which overtime was worked on Saturday and which on other days. Therefore, it will be assumed all overtime was on Saturday. As a result, the 48-hour week includes the straight time for the first 8 hours of overtime and for those 8 hours, the only overtime added is one-half time or $3.53 per hour. Any overtime more than 8 hours is calculated at time-and-a-half or

$10.58 per hour. As previously found, claimant worked more than 8 hours of overtime on two occasions, once 10 hours and the other time 10.25 hours. The total of 4.25 hours overtime (overtime more than 8 hours in a week) are calculated at $10.58 for $44.97. Claimant then worked a total of 32.5 hours of overtime which is calculated at one-half time for a total of $114.73. The total overtime used in the wage calculation is, therefore, $159.70 for an average overtime of $6.14 per week. This is the average of the weekly overtime pay not otherwise included in the 48-hour week.

(3) Claimant's average weekly wage is $379.46, including $338.40 in base pay, $6.14 in overtime, $3.81 in other pay, and $31.11 in insurance.

(4) The Board agrees with and adopts the finding by the Special ALJ that claimant has 25 percent general body impairment. First, the Board agrees the impairment is bilateral. The Board so finds based on the bilateral ratings of Drs. Moore and Delgado. The Board also finds claimant's work after leaving respondent was not a significant factor in causing the disability. The Board considers Dr. Delgado's rating and Dr. Ketchum's both to be entitled to weight. Dr. Delgado's was not, in our view, too early. Dr. Delgado is an experienced evaluator who felt he could give a permanent impairment rating at the time he saw claimant. Dr. Ketchum's opinion was not tainted, in our view, by the fact claimant had worked at other employers.

(5) The Board finds that any worsening in claimant's condition was a natural and probable consequence of the first injury, not the product of what might be considered a new accident or accidents under the Act. Dr. Ketchum's February 8, 1996, report states that he believes there was a worsening during the previous year. But Dr. Ketchum attributes the worsening to the scar tissue presumably from surgery. Such worsening is, in our view, a compensable part of the first injury.

(6) Claimant is entitled to future medical treatment on proper application and approval. As indicated, the Board finds the intervening work shown in this record was not a cause of the disability and similarly finds it does not preclude a finding that claimant may need treatment in the future for the injuries from his work for respondent.

## AWARD

**WHEREFORE**, the Appeals Board finds that the Award entered by Special Administrative Law Judge William F. Morrissey, dated March 17, 1997, should be, and is hereby, modified.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Chad Smith, and against the respondent, IBP, Inc., a qualified self-insured, and the Kansas Workers Compensation Fund for an accidental injury which occurred June 25, 1993, and based upon an average weekly wage of $379.46 for 9.14 weeks of temporary total disability compensation

at the rate of $252.99 per week or $2,312.33, followed by 405.86 weeks at the rate of $63.25 per week or $25,670.65, for a 25% permanent partial general disability, making a total award of $27,982.98.

As of April 15, 1998, there is due and owing claimant 9.14 weeks of temporary total disability compensation at the rate of $252.99 per week or $2,312.33, followed by 241.57 weeks of permanent partial compensation at the rate of $63.25 per week in the sum of $15,279.30 for a total of $17,591.63, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $10,391.35 is to be paid for 164.29 weeks at the rate of $63.25 per week, until fully paid or further order of the Director.

Future medical is awarded upon proper application to and approval by the Director.

The Appeals Board approves and adopts all other orders in the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
Tina M. Sabag, Dakota City, NE
Derek Chappell, Ottawa, KS
Stacy A. Parkinson, Olathe, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director